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John D. O'Reilly Jr.

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THE SPENCER ROANES OF 1958.†

JOHN D. O'REILLY, JR.*

THE SUPREME COURT of the United States is a unique institution among appellate courts.¹ But it has one thing in common with other judicial tribunals in that it has been, as have all courts since time immemorial, the subject of complaints poured into sympathetic ears by disappointed litigants and their counsel.²

From the time of John Jay the Court has been heaped with criticism, not infrequently amounting to invective and abuse. It has been condemned by Jeffersonians and Jacksonians. It has been reviled by Abolitionists. It has been cursed by those who saw it as the pawn of corporate interests, as a conspirator against organized labor, as the instrument of opponents of social reform, as the agent of the apostles of socialism, as the destroyer of capitalism, as the pamperer of criminals, and as various other manifestations of the devil incarnate.

Pamphleteers, editorial writers and political demagogues have always regarded the Court as fair game, with no closed seasons. But the critics have not been limited to such as these. Judge Spencer Roane, of Virginia, conducted vigorous campaigns in print against the Court

† The title should not give rise to invidious inferences based upon the legend that, but for the resignation of Oliver Ellsworth, Roane, not Marshall, would have been the fourth Chief Justice. That has been scotched as an "unsubstantiated tradition." Frankfurter, *John Marshall and the Judicial Function*, GOVERNMENT UNDER LAW 11, (Sutherland ed. 1956); 69 HARV. L. REV. 217, 221-22 (1955). The reference is to Roane's parts in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), as described in I WARREN, SUPREME COURT IN UNITED STATES HISTORY 447 (rev. ed. 1932) (in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, at 516 (1819); and in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, at 554 (1821)). See also 4 BEVERIDGE, THE LIFE OF JOHN MARSHALL, 157 (1929) (on *Martin* case at 313; the *McCulloch* case at 323; the *Cohens* case at 358). In general, on Roane, see Note, 66 HARV. L. REV. 1242 (1953).

* Professor of Law, Boston College Law School. A.B. 1928, Georgetown University; LL.B. 1932, Boston College; LL.M. 1933, Harvard University; Carnegie Scholar, Ann Arbor, summer 1934.

1. See the address of Chief Justice Vinson before the American Bar Association, *Work of the Federal Courts*, 69 Sup. Ct. v, vi (1949).

2. See the Comments of the Court per Frankfurter J. in *United States v. Morgan*, 313 U.S. 409, 421 (1941), concerning the letters of Secretary of Agriculture Henry A. Wallace to the editor of the *New York Times*, published May 8, 1938, and that of Frederick H. Wood, Esquire (counsel for the Livestock Commission Men) published May 15, 1938, discussing the decision in *Morgan v. United States*, 304 U.S. 1 (1938).

and its doctrine (although he had the good taste to use a pseudonym).³ Even the scholarly Story, after the death of Marshall, expressed, in private correspondence, doubts about the doctrines of the then new majority of the Court.⁴ In more recent years, on the Court itself, the summaries of dissents delivered on Opinion Days have been known to contain sharp barbs which, however, did not find their way into the United States Reports.⁵

Despite these familiar historical phenomena, it came as a distinct shock in August, 1958, that the Conference of State Supreme Court Chief Justices, at their annual meeting in Pasadena, California, exploded a formal resolution of denunciation of the Supreme Court. The Conference's Committee on Federal-State Relationships as Affected by Judicial Decisions released a report,⁶ the conclusions of which formed the basis of the resolution.

The prestige which should attach to the Conference suggests that the criticisms and the basis thereof deserve more careful attention and comment than would the diatribes of the familiar casual columnist or the axe-grinding politician.

No attempt will be made to paraphrase the terms in which the Chief Justices found fault with the Court. Their Resolution is set forth, in full, in the Appendix hereto. Nor should the ensuing remarks be taken as an *apologia* for the Court. That would be presumptuous. What is intended is the suggestion that (assuming, *arguendo*, the propriety of public discussion of such a subject by the Pasadena discussants) when comment upon public institutions or doctrines is made by groups of high professional standing it should bear the earmarks of high professional competency, it should be precisely stated, and it should be supported by its internal cogency rather than by the putative authority of its expositors.

3. I WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 516, 555 (rev. ed. 1932).

4. *Id.*, II, 28.

5. The extreme instance of this sort of thing was perhaps the utterance of Mr. Justice Reynolds, who prefaced the oral announcement of his dissent in *Norman v. B&O R. Co.*, 294 U.S. 240 (1935) and *Perry v. United States*, 294 U.S. 330 (1935) with: "... [T]he Constitution, as we have known it, is dead."

6. The Report has been distributed in mimeograph form by the Conference. It has been published in the *Los Angeles Daily Journal* in the issues of August 21 and 22, 1958. A preliminary release, printed in 104 CONG. REC. Appendix A 7782 (daily ed. August 25, 1958) includes a few passages which were deleted prior to ultimate submission of the Report. All quotations from the Report herein are from the final version submitted to the Conference.

[However, for the convenience of the reader, major quotations from the Report will be cited to the Congressional Record. *Ed.*]

I.

THE REPORT.

After quoting Madison's prediction in *The Federalist No. 45* that the great bulk of regulatory jurisdiction would remain in the states, the Report recites that the "outstanding development in Federal-State relations since the adoption of the national Constitution has been the expansion of the power of the National Government and the relative contraction of the powers of the state governments."⁷ This, the Committee immediately concedes, has been a matter of practical necessity.

The Report then proceeds: "Second only to the increasing dominance of the National Government has been the development of the immense power of the Supreme Court in both state and national affairs. It is not merely the final arbiter of the law; it is the maker of policy in many major social and economic fields."⁸ Policy making is not defined in the Report, but, whatever it is, it is sometimes difficult to distinguish it precisely from exercise of "the judicial function." Indeed a court may sometimes be required to "make what is actually a policy decision by choosing between two rules, either of which might be deemed applicable to the situation presented in a pending case."⁹ (In its statement of conclusions the Committee asserts that, ". . . the Supreme Court has frequently — one might, indeed, say customarily — exercised policymaking powers going far beyond those involved, say, in making a selection between competing rules of law.")¹⁰

Then, still without the laying of a foundation, there follows this amazing paragraph:

"But if and when a court, in construing and applying a constitutional provision or a statute becomes a policymaker, it *may* leave construction behind and exercise functions which are essentially legislative in character, whether they serve in practical effect as a constitutional amendment or as an amendment of a statute. It is here that we feel the greatest concern, and it is here that we think the greatest restraint is called for. There is nothing new in urging judicial self-restraint, though there may be, and we think there is, new need to urge it." (Emphasis added.)¹¹

After this undocumented thrust, the Report reverts to the topic of expansion of national power. It refers, discursively, to the Supremacy

7. 104 CONG. REC. Appendix A 7783 (daily ed. Aug. 25, 1958).

8. *Ibid.*

9. *Ibid.*

10. *Id.* at 7787.

11. *Id.* at 7783.

Clause, the commerce power, the Income Tax Amendment, the General Welfare Clause and federal grants-in-aid. The discussion of the factors in the growth of the central Government concludes with the observation that, ". . . since the decision of *Massachusetts v. Mellon*,¹² there seems to be no effective way in which either a State or an individual can challenge the validity of a Federal grant-in-aid."¹³ The relevance of this statement to the Report is not immediately apparent. It may be the Committee's way of fixing upon the Court responsibility for the enlargement of federal functions. It is almost certainly not intended as an encomium of the Court's "judicial restraint" in declining to inquire into the validity of appropriation acts.

Coming finally to an area where the Court's actions take on a greater degree of significance, the Report speaks of the doctrine of preemption of state authority by federal legislation. After noting the recent application of the doctrine in the non-commerce field of regulation of sedition (without noting that it had long been applicable in the non-commerce field of bankruptcy)¹⁴ the Committee concludes that the "fact . . . [that the decision in the *Nelson*¹⁵ case affirmed the state court decision] emphasizes rather than detracts from the wide sweep now given to the doctrine of preemption."¹⁶

In the labor-relations field, the Report goes on, the doctrine has brought about considerable confusion and uncertainty. The *Wisconsin Bus* case¹⁷ points up or creates ("depending upon how one looks at the matter") serious problems in that it leaves states without jurisdiction to prevent strikes by employees of public utilities. Note is made, however, of the *Gonzales*¹⁸ and *Russell*¹⁹ cases, which sustained state court judgments for damages against unions for certain unlawful conduct.

In perhaps dubious connection with preemption the Committee reports that it finds certain language in the majority opinion in *Textile Union v. Lincoln Mills*²⁰ "disturbing." That language was to the effect that Section 301(a) of the Taft-Hartley Act, in providing for federal court suits for violation of collective bargaining agreements, constitutes a mandate to federal courts to formulate a body of federal law

12. 262 U.S. 447 (1923).

13. 104 CONG. REC. Appendix A 7783 (daily ed. Aug. 25, 1958).

14. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

15. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

16. 104 CONG. REC. Appendix A 7784 (daily ed. Aug. 25, 1958).

17. *Bus Employees v. Wisconsin Board*, 340 U.S. 383 (1951).

18. *Machinists v. Gonzales*, 356 U.S. 617 (1958).

19. *Automobile Workers v. Russell*, 356 U.S. 634 (1958).

20. 353 U.S. 448 (1957).

for the enforcement of such agreements. Why this is disturbing is not immediately explained. (One might have thought it a direction to do, within an area clearly subject to federal control, what English and American common-law judges have been doing for centuries and what federal judges, acting in forbidden areas, had been doing prior to *Erie Railroad v. Tompkins*.)²¹ But in the statement of its conclusions, the Committee says that this language,

“... reads to us very much as if the Supreme Court found in a somewhat obscurely worded section of the Labor Management Relations Act a grant by Congress to the Federal courts of a power closely approximating legislative power. Perhaps no more is meant by the term to fashion a body of Federal law than to interpret and apply a statute whose meaning is rather vague, but the possible implications of this phrase may be considerably broader.”²²

The Committee refers with approbation to *Erie Railroad v. Tompkins*, remarking, perhaps over-optimistically: “This marked the end of the doctrine of a Federal common law in such [diversity] cases.”²³ The course of decisions under which state courts were allowed increasingly wider scope of jurisdiction to render in personam judgments against non-residents is noted with approval, save, perhaps, as the trend was “halted” in *Hanson v. Denckla*.²⁴ With some unspecified reservations, “on the whole the Supreme Court seems perhaps to have taken a more liberal view in recent years toward the validity of State taxation than it formerly took.”²⁵

The Report then returns to the attack and brings up the matter of the Fourteenth Amendment. The Committee's complaint about the Court's implementation of substantive due process consists of criticism of three classes of cases. Exception is taken to the result reached in the *Sweezy*²⁶ case in which the Court found a due process limitation upon the investigatory powers of a state legislature. Next are cases involving termination of public employment of employees charged with association with subversive groups. The cases,²⁷ in some of which the court overruled, and in others of which it sustained public authori-

21. 304 U.S. 64 (1938). See the application of the Lincoln Mills Doctrine in *Engineers Association v. Sperry Gyroscope Co.*, 251 F.2d 133 (2d Cir. 1958). Also, see Mishkin, *The Variousness of Federal Law*, 105 U. PA. L. REV. 797 (1957).

22. 104 CONG. REC. Appendix A 7787 (daily ed. Aug. 25, 1958).

23. *Id.* at 7784.

24. 357 U.S. 235 (1958).

25. 104 CONG. REC. Appendix A 7784 (daily ed. Aug. 25, 1958).

26. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

27. *Lerner v. Casey*, 357 U.S. 468 (1958); *Beilan v. Board of Education*, 357 U.S. 399 (1958); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956).

ties in their discharge of employees are simply listed but not commented upon. Finally, the Report discusses at length the *Konigsberg*²⁸ case in which the Court reversed the denial of the petitioner's application for admission to the bar on the ground that his refusal to answer questions as to his membership in and association with the Communist Party and other organizations established lack of the requisite good moral character. The Report forcefully criticizes the result reached by the Court there and supports the position taken by Mr. Justice Harlan as set forth in his dissenting opinion.

The Report fails to set forth any doctrine, judicial attitude, or other element common to the three cited decisions or to indicate in what way the criticism of the individual cases tends to support the generality of the introductory sentence of the section of the Report in which these cases are discussed: "In other fields, however, the Fourteenth Amendment has been invoked to cut down State action."²⁹

The final portion of the Report touches upon Supreme Court review of procedure in state criminal cases. This part, too, consists of lengthy summaries of four such cases,³⁰ expression of disagreement with the results reached in all four, and speculation as to the possible practical implications of two, which involved, basically, a single issue, an indigent defendant's right to a transcript of the trial record for appeal.

By way of conclusion the Committee, after protesting its awareness of the fact that changing conditions require constant adjustments in federal-state relations, expresses the view that "the overall tendency of decisions of the Supreme Court over the last 25 years or more has been to press the extension of federal power and to press it rapidly,"³¹ and sets forth the thoughts summarized in the resolution adopted by a 36 to 8 vote of the Conference, which appears in the Appendix hereof.

II.

STATES' RIGHTS.

The Report states: "The difference between matters primarily local and matters primarily national was the guiding principle upon which the framers of our National Constitution acted in outlining the division of powers between the National and the State Governments."³²

28. *Koigsberg v. State Bar*, 353 U.S. 252 (1957). The Report does not specifically refer to *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957).

29. 104 CONG. REC. Appendix A 7784 (daily ed. Aug. 25, 1958).

30. *Eskridge v. Washington Prison Board*, 357 U.S. 214 (1958); *Lambert v. California*, 355 U.S. 255 (1957); *Moore v. Michigan*, 355 U.S. 155 (1957); *Griffin v. Illinois*, 351 U.S. 12 (1956).

31. 104 CONG. REC. Appendix A 7787 (daily ed. Aug. 25, 1958).

32. *Id.* at 7782-83.

This is not an accurate statement. Indeed, the writings of de Tocqueville³³ and Madison,³⁴ quoted in the Report, indicate that the shadings connoted by the adverb "primarily" did not enter into the calculations of the Fathers. For them, each subject of government fell under either the nation or the states, and most subjects were to be under the states. There were to be areas of black and of white, but no grays. This was the orthodox assumption upon which Marshall wrote in the *Steamship Case*.³⁵ He wanted to establish that the federal area was a little, perhaps substantially, larger than Madison had thought it would be, but he did not dispute that the state area was a separate one. He may have had some misgivings, five years later, about the implications of the *Blackbird Creek*³⁶ case as he was writing the cryptic opinion he filed there, but he did not question the accepted postulate. After all, this was but the second Commerce Clause case to come before the Court.

It was not until 1851, in the *Philadelphia Pilotage*³⁷ case, that Mr. Justice Curtis was able to announce that the separate-exclusive compartments theory of distribution of powers between nation and states was an unrealistic over-generalization, unworkable as a starting point of constitutional exposition. Congress, of course, has power to regulate commerce, but it does not follow that the states are completely powerless. There are regulations of commerce which only Congress can make but the entire commerce area is not closed to the states.

The disclosure of this dichotomy suggests the relevance of a passage from de Tocqueville, shortly following the one quoted in the Report. After expressing agreement with the Madisonian prophecy that state regulation would be the rule and federal regulation the exception, the author goes on:

"But as it was foreseen that, in practice, questions might arise as to the exact limits of this exceptional authority, and it would be dangerous to submit these questions to the decision of the ordinary courts of justice established in the different states by the states themselves, a high Federal court was created, one of whose duties was to maintain the balance of power between the two rival governments as it had been established by the Constitution."³⁸

33. I DE TOCQUEVILLE, DEMOCRACY IN AMERICA 118 (Vintage Book ed. 1954).

34. THE FEDERALIST No. 45 (Madison).

35. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

36. *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829).

37. *Cooley v. Port Wardens*, 53 U.S. (12 How.) 299 (1851).

38. I DE TOCQUEVILLE, DEMOCRACY IN AMERICA 119 (Vintage Book ed. 1954).

It was only after the Court discovered that the constitutional distribution of governmental powers was not altogether made in terms of black and white that it became proper to think in terms of things "primarily" local and things "primarily" national. But this kind of thinking came to be done in a negative sort of way. Typically, it came to be recognized that there is a legitimate public interest in keeping utility rates at a reasonable level, so that implementation of this interest may require regulation of the rates by public authority,³⁹ but, if a particular utility is an interstate carrier, the ("primary," if you will) national interest cannot tolerate rate regulation by state authority.⁴⁰

It can be pointed out that the inroads started by Mr. Justice Curtis into the separate compartments theory of distribution of powers were directed to the issue of exclusiveness or non-exclusiveness of federal powers, and did not logically call for fragmentation of the Madisonian preserve of the states. Indeed, the United States Reports are replete with impassioned declarations that such things as insurance,⁴¹ manufacture⁴² and mining⁴³ are not commerce. These declarations go on to recite that the activities in question are subject to state, not federal control, and to indicate that, if this were not so, the life of federalism would be at an end. Whether or not these recitals be thought extravagancies, they were, with one transitory exception,⁴⁴ all expressed in cases where the challenges that were made were to state regulation, and where there was no question of actually attempted federal control.

But "the life of the law has not been logic",⁴⁵ and, whether by logical necessity from the original break in the Madisonian theory or not, we were driven to recognize the converse of the *Philadelphia Pilotage*⁴⁶ doctrine, and to admit the power of Congress sometimes to regulate that which the states have power to regulate.

When the deficiencies of state power to regulate interstate carriage rates became known, the necessity of some sort of regulation produced the Interstate Commerce Act.⁴⁷ Eventually, it was learned that effective control under that act would sometimes involve regulation of intra-

39. *Munn v. Illinois*, 94 U.S. 113 (1876).

40. *Wabash v. Illinois*, 118 U.S. 557 (1886).

41. See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868).

42. See *Kidd v. Pearson*, 128 U.S. 1 (1888).

43. See *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923).

44. *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

45. HOLMES, *THE COMMON LAW* 1 (1881).

46. See text at note 37 *supra*.

47. 24 STAT. 379 (1887), 49 U.S.C. §§ 1-40 (1952).

state rates, a subject normally within state domain. The necessity of federal control of the subject determined the existence of federal power to reach the subject.⁴⁸

The semantics of constitutional law should have told us, ever since *McCulloch v. Maryland*,⁴⁹ that, given an Interstate Commerce Act, if it is necessary and proper for effective enforcement of that act to have federal regulation of the completely internal commerce of a state, such regulation may be imposed. We, of course, did not know any such thing until the majority of a divided Court told us so, ninety-five years after *McCulloch v. Maryland*.

The process of constitutional adjudication is not a matter of semantics. It consists of the utilization of authoritatively received techniques to ascertain, with the aid of argument by skilled counsel in adversary proceedings, what ideals and standards, as well as formalized rules, are relevant in particular cases, and to apply them to the resolution of controversies. Nearly every case before the Court involves exploration of a new territory, with occasional incidental (and, infrequently, direct) re-exploration of an old one. The specific criteria are few, and dimly illumined. These are facts known to all students of the Court.

It is amazing, though, to find in the Report such language as this, in tones of accusation:

"It has long been an American boast that we have a government of laws and not of men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast. We find first that in constitutional cases unanimous decisions are comparative rarities and that multiple opinions, concurring or dissenting, are common occurrences. We find next that divisions in result on a 5-to-4 basis are quite frequent. We find further that on some occasions a majority of the Court cannot be mustered in support of any one opinion and that the result of a given case may come from the divergent views of individual Justices who happen to unite on one outcome or the other of the case before the Court."⁵⁰

The "Government of Laws" formula had no more literal validity when John Adams penned it in 1780⁵¹ than did the tripartite separation-

48. The Shreveport Case, 234 U.S. 342 (1914).

49. 17 U.S. (4 Wheat.) 316 (1819).

50. 104 CONG. REC. Appendix A 7788 (daily ed. Aug. 25, 1958).

51. The Massachusetts Constitution of 1780, Declaration of Rights, Art. XXX: "In the government of this Commonwealth, judicial powers or either of them; The executive shall never exercise the legislative and judicial

of-powers formula with which he prefaced it. The two formulae, conjunctively, are expressive of a broad, universally applicable ideal of democratic government, whose detailed meaning, however, must needs be (as it has been) gradually adumbrated over the years in the light of the various situations upon which it has been brought to bear. They certainly do not envisage the body of law, particularly the law of the Constitution, as an all-inclusive code to be administered by the judges in a ministerial way.

Too many people have been intrigued with the mechanical simplicity of the process of constitutional adjudication as it seems to them to be described by Mr. Justice Roberts in the *Butler Case*.⁵²

"When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."

Too few people read on to the two following sentences, where the Justice utters the disarming understatement:

"All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment."

The fact is that the Constitution itself sets forth no such doctrine as that which Madison and de Tocqueville describe, and save for two aberrational decisions of the Supreme Court no such doctrine has ever been recognized in actual practice. One of these was *United States v. Butler*⁵³ where the Court struck down the first Agricultural Adjustment Act on the ground that if crop plantings are to be cut back by law it must be by state, not national law. That sort of thinking, of course, has not had any legal effect since the Court sustained the power of Congress to enact the Social Security Law.⁵⁴ Indeed, the Committee must have recognized this fact. Its Report cites the *Social Se-*

powers, or either of them; The judicial shall never exercise the legislative and executive, or either of them; to the end it may be a government of laws and not of men."

That this doctrine was not literally followed in the Massachusetts Constitution itself was pointed out by Madison in THE FEDERALIST No. 42. The Massachusetts Court has been less than literal in applying the Article. See *LaChapelle v. United Shoe Machinery Corp.*, 318 Mass. 166, 61 N.E.2d 8 (1945).

52. *United States v. Butler*, 297 U.S. 1, 62 (1936).

53. *Ibid.*

54. *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).

curity Cases, although with somewhat different emphasis. The other case, of course, was *Hammer v. Dagenhart*⁵⁵ which likewise has long been repudiated.

The Report refers to the *Butler* case as one in which the Court took a broad view of the General Welfare Clause but found it inapplicable in the case so that its implementation was postponed until later decisions. The Report does not express it in so many words but the reference to the case in the context of reference to the Madison doctrine of distribution of powers reveals a nostalgia for the never-never land into which Mr. Justice Roberts, for the Court, journeyed in order to avoid application of the General Welfare Clause there.

It is not without irony that the asserted inattention of the Court to state sovereignty elicited from the Chief Justices their exhortation "that that great Court exercise to the full its power of judicial self-restraint by adhering firmly to its tremendous strictly judicial powers and by eschewing, so far as possible, the exercise of essentially legislative powers when it is called upon to decide questions involving the validity of state action"⁵⁶ When the majority of the Court in the *Butler* case ruled an act of Congress invalid because it invaded an area reserved to the states, Mr. Justice (as he then was) Stone felt impelled in dissent to admonish the brethren: ". . . [T]he only check upon our own exercise of power is our own sense of self-restraint."⁵⁷ Thus, what is essentially the same rhetorical flourish is used in support of both sides of the argument.

There is serious question, however, how far rhetorical flourishes may be used legitimately in the formulation of constitutional doctrine. When the same Mr. Justice Stone spoke for the majority which gave the *coup de grace* to the enclave-of-exclusive-state-jurisdiction doctrine he wrote the aphorism that "the [Tenth] Amendment states but a truism that all is retained that has not been surrendered."⁵⁸ Epigrammatic this is; sound law it is not. A play upon the words of the Tenth Amendment should not guide us to the opposite extreme from the position of the majority in *Butler*, nor obscure the fact that, whether by "an invisible radiation from the Tenth Amendment,"⁵⁹ or otherwise, the actuality of state sovereignty in a federal union is a most important factor in the evaluation of both state and federal laws. The Stone epigram, if it is to be considered significant at all, should be taken

55. 247 U.S. 251 (1918).

56. 104 CONG. REC. Appendix A 7788 (daily ed. Aug. 25, 1958).

57. *United States v. Butler*, 297 U.S. 1, 79 (1936) (dissenting opinion).

58. *United States v. Darby Lumber Co.*, 312 U.S. 100, 124 (1941).

59. *Missouri v. Holland*, 252 U.S. 416, 434 (1920).

simply as a warning that the Tenth Amendment does not set forth a formula by which the process of evaluation is to be worked out.

A more persuasive refutation of the "States' rights" argument advanced in the *Wage and Hour* case was Stone's succinct phrase, "*Hammer v. Dagenhart* has not been followed".⁶⁰ This was documented by citation of cases in which the Court had decided subsequent to 1918 (as it likewise had prior to that year) that Congress could properly regulate many of the things which John Marshall, in an earlier day, described as "the completely internal commerce of a state."⁶¹

It should perhaps be emphasized at this point that Marshall's use of this phrase was completely *obiter*, possibly an inadvertent acquiescence in the "enclave" states' rights theory, possibly a conscious sop to those who would be shocked by his proclamation of federalist doctrine. It was on the basis of a verbal inference, not of experience and reflection, that Marshall assumed the existence of concerns "which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."⁶² It should be borne in mind that this assumption of Marshall was only remotely incidental to his main purpose of the moment; that was to describe affirmatively what the "commerce" of Article I, Section 8 was, rather than what it was not.

The ideal of federalism which has come to be established is not one of pitting the states against the United States in eternal conflict, but rather one of efficient division of labor and cooperation to achieve the sometimes forgotten objectives set forth in the Preamble: . . . [E]stablish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The story of joint

60. *United States v. Darby Lumber Co.*, 312 U.S. 100, 116 (1941).

61. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

62. "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself." 22 U.S. (9 Wheat.) 1, 194-95 (1824).

action by state and national governments for the solution of public problems, such as control of narcotics traffic,⁶³ theft of motor vehicles,⁶⁴ commercial prostitution⁶⁵ and an infinite variety of other matters is too familiar to require cataloging here.

III.

FEDERAL POWERS.

There is another sense in which the phrase "States' rights" is frequently used. This is in connection with situations where state-federal cooperation is not permitted because the Congress has enacted legislation which has "occupied the field" and thus barred or superseded state action, even by way of supplementary legislation. This, of course, is the converse of the discredited doctrine of states' rights referred to above.

Contrary to a possible implication of the Committee Report the doctrine of preemption was not newly invented even as to labor relations in the *Wisconsin Bus* case.⁶⁶ The doctrine was actually the basis of Marshall's decision in *Gibbons v. Ogden*,⁶⁷ although many years elapsed after that decision before the preemption doctrine as such was formally recognized.

The Committee Report seems to complain of the "wide sweep now given to the doctrine of preemption."⁶⁸ The precise point (or points) of the complaint is not clear, unless it is a part of the criticism that Supreme Court decisions have left too small and/or too indefinite areas for exercise of state regulatory powers.

The Report would convey to the casual reader an impression that the practice of the Court is to use every opportunity to trample roughshod on state laws whenever it is possible to find a federal law which can be construed as superseding one of them. This impression, perhaps not intended, would be a completely distorted one. The fact of the matter is that the Court is always deeply conscious of the importance of state sovereignty and usually attempts to find a basis upon which continued exercise of state power can be reconciled with the demands of federal law administration.

Thus, although it was established even in John Marshall's day that exercise of the bankruptcy power will normally be to place state

63. *United States v. Doremus*, 249 U.S. 86 (1919).

64. *Brooks v. United States*, 267 U.S. 432 (1925).

65. *Hoke v. United States*, 227 U.S. 308 (1913).

66. See note 17 *supra*.

67. See note 35 *supra*.

68. 104 CONG. REC. Appendix A 7784 (daily ed. Aug. 25, 1958).

laws in abeyance,⁶⁹ the Court's insistence upon the necessity of preserving a balance in federal-state relations led it to scrutinize the federal bankruptcy power so closely that the Municipal Bankruptcy Act was held *ultra vires* by the Congress.⁷⁰ (As it turned out this was a too deferential gesture to local sovereignty. At the request of the states, Congress enacted a modified statute giving the benefits of bankruptcy administration to political subdivisions of the States).⁷¹ Of course deference to state sovereignty must have its limits, and when exercise of state authority is clearly incompatible with, for example, efficient administration of the reorganization provisions of the Bankruptcy Act, state authority must give way.⁷²

Bankruptcy is of course not the only area in which the Court has exercised restraint in application of the preemption principle. Even in the field of anti-trust regulation where the reach of Congress has been held to touch many local affairs related to commerce only by the most tenuous of ties, the Court has performed its function of interpreting anti-trust legislation with a careful eye on the possible impacts of alternative interpretations upon the sovereign powers of the States.⁷³ In areas, such as highway regulations and the like, where states have particular legislative competence, the Court has been particularly reluctant to discern in federal legislation a policy which would require that state laws be superseded.⁷⁴ On one occasion, indeed, a majority of the Court went to the extreme of sustaining a state law which was an exact duplicate of a federal law covering the same subject simply because it was not repugnant to the latter.⁷⁵

What is too often overlooked by critics of preemption is that there is no single formula of preemption. Each case must be decided upon its own facts. Perhaps some cases have been wrongly decided. That is beside the present point. It is quite understandable that when the Supreme Court sees in federal legislation a pattern indicative of a congressional purpose to take over exclusive regulation of a

69. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827).

70. *Ashton v. Cameron County District*, 298 U.S. 513 (1936).

71. 50 STAT. 653 (1937), 11 U.S.C. § 401 (1952). See *United States v. Bekins*, 304 U.S. 27 (1938).

72. *Palmer v. Massachusetts*, 308 U.S. 79 (1939).

73. *United States v. Women's Sportswear Assn.*, 336 U.S. 460 (1949); *Federal Trade Comm. v. Bunte Bros.*, 312 U.S. 349 (1941); *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

74. This has been true whether attack upon state laws in this field is based upon asserted negative implications of the Commerce Clause (*South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938); *Buck v. Kuykendall*, 267 U.S. 307 (1925)); or upon asserted preemption by federal law (*Welch Co. v. New Hampshire*, 306 U.S. 79 (1939)).

75. *California v. Zook*, 336 U.S. 725 (1949).

subject such as seditious activity, other able and sincere men, looking at the same legislation may not be able to perceive the same pattern which the Court saw. If the other group of men should constitute a majority of the Congress and should conclude, for example, that the pattern of federal legislation in the area of control of subversive activity is not ideologically and practically incongruous with state control in the area, the Congress may, by a simple (or perhaps a complex) act of legislation, restore state jurisdiction in that area or any part thereof. What is important is that there is no area of state regulation which is immune to preemption. That the course of decision bearing upon a given area may often leave serious problems and even grave uncertainty as to just how much has been preempted serves only to emphasize the involved intricacy of federal-state relations in complexly developed fields.

The difficulty of finding solutions to these problems will not be removed by hurling epithets at the Court which has to make the best possible adjustments of the conflicting forces which bear upon cases coming before it. The fact should be faced up to that the problems are not simple and cannot be simplified by conjuring up a magical recipe for rendering to the nation the things that are the nation's, and to the states the things that are the states'.

The field of labor-relations control appears to the Committee to yield particularly bitter fruit. Yet it is the field which perhaps best illustrates the point just stated. Congress, in 1947, made express provision for preserving by delegation some area of state jurisdiction in that field.⁷⁶ Yet, in the intervening years, it has been administratively impossible to implement that act of preservation.⁷⁷ That attempt at reservation to the states was by way of carving out an exception to a more general doctrine of preemption reached by the Court under the Wagner Act of 1935. Again, in all the intervening years, Congress has been unable to produce a formula which would at once keep the policy of the National Labor Relations Act intact and preserve specific items for state control. Administrative failure or inability, whether for budgetary, policy or other reasons, to take jurisdiction of certain matters covered by the legislation do not, as a matter of logical necessity, indicate a void which must be filled by state control until the failure or inability is ended. They may simply indicate a void.

In the light of these considerations what is to be thought of the following observation in the Report?

76. 61 STAT. 146 (1947), 29 U.S.C. § 160(a) (1952).

77. *Guss v. Utah Labor Board*, 353 U.S. 1 (1957).

"Regardless of what may be the ultimate solution of jurisdictional problems in this [labor relations] field, it appears that at the present time there is unfortunately a kind of no-man's land in which serious uncertainty exists. This uncertainty is in part undoubtedly due to the failure of Congress to make its wishes entirely clear. Also, somewhat varying views appear to have been adopted by the Supreme Court from time to time."⁷⁸

Despite the fact that the Report has placed division of sovereignty on the same level with intragovernmental separation of powers, the Committee belabors the Court for its decision in *Textile Union v. Lincoln Mills*.⁷⁹ It felt that the Court had, somehow, offered an affront to the sovereign states by construing Section 301(a) of the Taft Hartley Act as containing a mandate to federal courts to formulate a body of federal law to govern breaches of collective bargaining agreements. Before belatedly recognizing that Section 301(a) may have the effect of ousting state courts of jurisdiction to give relief for breach of collective bargaining agreements subject to the federal act, the Report complains bitterly of the hardship the decision imposes upon state courts which may have to ascertain what the applicable federal law may be.

In its haste to condemn the Court for this imaginary grievance, the Committee overlooks completely the alternative which had been urged upon the Court. That was to declare Section 301(a) unconstitutional as in excess of the powers contained in Article III. That the Court exercised great restraint, if not ingenuity, in refraining from overruling Congress, even after a third of its membership (constituting half of those then voting on the question)⁸⁰ had once expressed the thought that this would be in order, does not mitigate the guilt of adopting "the role of policy-maker without proper judicial restraint."

IV.

THE ROLE OF THE COURT.

There is a third sense in which the phrase "States' rights" may be used and it is this sense which has been the basis of the more enlightened controversies over constitutional adjudications, particularly in recent years.

There are certain provisions of the constitution which expressly say that the states must not do various things. They must not coin

78. 104 CONG. REC. Appendix A 7784 (daily ed. Aug. 25, 1958).

79. 353 U.S. 448 (1957).

80. See *Westinghouse Employees v. Westinghouse Corp.*, 348 U.S. 437 (1955).

money or grant any title of nobility or make laws impairing the obligation of contract and so on. There are also some prohibitions which are not so specific. The Fourteenth Amendment recites that no state shall deprive any person of life, liberty, or property without due process of law. Such a constitutional limitation, administered by courts in their review of the acts of other branches of government, leaves the courts with a standard for decision virtually as broad as those which Justices Samuel Chase and Johnson once thought should be applied.⁸¹ This result would at least seem to run counter to the thesis of Justice Iredell,⁸² in his reply to Chase, that the Court does not have a roving commission to administer justice, but is limited to expounding the Constitution.

This, in substance, is what Judge Learned Hand⁸³ had in mind when he recently at least came close to suggesting (one suspects somewhat tongue-in-cheek) that, apart from procedural matters, a simple solution of many of the problems of judicial review would be to make the implementation of the Due Process Clause none of the Supreme Court's business. Hand, however, was careful to postulate in his argument that it is beyond the competency of any court to determine as a basis of judicial decision the content of the political ideals summarized in the phrase "due process of law."⁸⁴ That postulate has in recent years been the subject of controversy in the Court itself, Justice Frankfurter being the principle spokesman of those who believe that the Court has such competency, and Justice Black advocating the opposing viewpoint.⁸⁵

Although the Committee cites Judge Hand's lectures in support of its condemnation of the exercise by the Court of "primarily legislative powers," there is no indication in the Report that the Committee would divest the Court of jurisdiction to expound the Due Process Clause in its substantive phases. The complaint of the Committee is not only sparsely documented but it is completely lacking in precision of statement. The clear impression is created that the Committee has no more than a visceral feeling that somehow the Court has gone "too far" in limiting freedom of choice on the part of state legislatures and courts in the name of the Due Process Clause.

81. See *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 143 (1810); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798).

82. *Calder v. Bull*, *supra* note 81, at 398-99.

83. HAND, *THE BILL OF RIGHTS* (1958).

84. *Id.* at 3, 34.

85. See, e.g., *Rochin v. California*, 342 U.S. 165 (1952); *Wolf v. Colorado*, 338 U.S. 25 (1949); *Adamson v. California*, 332 U.S. 46 (1947).

The very notion of judicial review imports something of the super-legislature, or Learned Hand's "third chamber."⁸⁶ It should not, of course, develop into too much of that, but the line between "just enough" and "too much" cannot be drawn with precision in due process cases any more than in commerce cases.⁸⁷ This line, as are so many others, is a variable, located differently in different times and different circumstances. Its location in any given context is necessarily determined by the Court itself upon consideration of a great complex of relevant factors. To criticize the Court's location of the line in any given instance on the ground that the Court's action is making ours a government of men rather than of laws is to succumb to a tyranny of platitudes.

"States' rights," in the third sense, may be taken to signify the deference to which state dignity and sovereignty are entitled, so that these should be taken into account whenever the Constitution itself, as well as acts of Congress, is sought to be applied in such a way as to forbid the exercise of an asserted state power. This deference, although it is a very real and vital factor in the process of constitutional decision, is an imponderable element. Its intensity cannot be measured, in a given instance, or even over a period of time, by simply stating the results reached in specific cases. The presence or absence of this ingredient is to be determined by close and critical analysis of the Court's technique of decision and observation of its treatment of the various components of the complex of relevant factors before it. It is not a valid criticism to say simply, "I disagree with the decision the Court made, and I think the Court is going too far."

In dealing with Supreme Court review of criminal procedure in state courts, the assertion is made in the Report that in many matters, such as the fair drawing of juries and the like, "we do not believe that there is any real difference in doctrine between the views held by the Supreme Court of the United States and the views held by the higher courts of the several states."⁸⁸

It hardly needs pointing out that in all of the cases in which convictions had to be reversed because of failure of state criminal courts to observe the minimal rudiments of fair procedure, none came to the Court upon appeal by the state from a decision of the highest court of a state disapproving the procedure followed at the trial. In every

86. HAND, *op. cit. supra* note 83, at 42.

87. Compare *Chicago, R.I. & P.R. Co. v. Arkansas*, 219 U.S. 453 (1911) with *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

88. 104 CONG. REC. Appendix A 7786 (daily ed. Aug. 25, 1958).

case a state appellate court had already countenanced denial, at the trial level, of a defendant's right to due process of law.

Indeed, the greater threat to the vindication of individual rights in this area would seem to consist, not in the Supreme Court exercising undue zeal in reviewing asserted state court denials of such rights, but rather in such widespread complacency on the part of state courts in the face of invasions of such rights that the Supreme Court may well be embarrassed into withholding its reversing hand, lest it seem to probe too far into what some would call the minutest of local law enforcement machinery. This may well have been the basis of last term's reluctant refusal to affix the tag of unconstitutionality to police denial of access by lawyers to their clients between the times of arrest and arraignment.⁸⁹ The judicial restraint which the Conference charges to be lacking in the Court was manifestly present in these cases.

But (passing its questionable assertion of general adherence by the highest state courts to basic doctrines of fair criminal procedure) the Conference Committee complains that "In such matters the Supreme Court not only feels free to review the facts, but considers it to be its duty to make an independent review of the facts."⁹⁰ Reference is made to the traditional attitude of appellate courts to findings of fact in private law cases. "Appellate courts generally will give great weight to the findings of fact by courts which had the opportunity to see and hear the witnesses, and they are reluctant to disturb such findings."⁹¹

It is at this point that the Conference Committee reveals a lack of understanding of the role of the Supreme Court in constitutional adjudication. This approach indicates failure to appreciate the lesson taught by John Marshall that "we must never forget it is a *Constitution* we are expounding."⁹² Overlooked is the great difference between findings of the trial judge in an ordinary case of specific performance and findings of facts upon the existence or non-existence of which fundamental rights guaranteed by the organic law depend. Overlooked is the explanation of Chief Justice Taft of the practical necessity of independent fact determination by the Supreme Court if it is to fulfill the constitutional function it has exercised ever since *Martin v. Hunter's Lessee*.⁹³ The late Chief Justice once said:

89. *Ashdown v. Utah*, 357 U.S. 426 (1958); *Crooker v. California*, 357 U.S. 433 (1958); *Cicenia v. Lagay*, 357 U.S. 504 (1958).

90. 104 CONG. REC. Appendix A 7786 (daily ed. Aug. 25, 1958).

91. *Ibid.*

92. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

93. 14 U.S. (1 Wheat.) 304 (1816).

"In cases brought to the Court from State Courts for review, on the ground that a federal right set up in the State Court has been wrongfully denied, and in which the State Court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this Court as an incident of its power to determine whether a federal right has been wrongfully denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a State Court practically to prevent a review here."⁹⁴

The Conference Committee seeks to drive home its point by taking issue, on the merits, with the decisions in two cases handed down in the 1957 Term of the Court.⁹⁵ Without pausing to join in the debate, suffice it to say that such criticism has no bearing upon the validity of the principle of independent review in the Supreme Court of crucial factual determination, decisive of asserted federal rights.

In the Committee's references to the Court's implementation of the 14th Amendment's Due Process Clause the impression is given that the Court is using this clause as a weapon for stripping the states of powers which are properly theirs. Among its conclusions the Committee recites that the Report, "shows, on the whole, a continuing and, we think, an accelerating trend toward increasing powers of the National Government and correspondingly contracting those of the State governments Much [of this] comes from the extent of the control over the action of the States which the Supreme Court exercises under its views of the 14th amendment."⁹⁶

This proposition is not supported by any thesis developed in the body of the Report. If, as could readily be established, there is a germ of truth in the statement, the Report falls far short of presenting a balanced and complete picture of the effect upon state autonomy of the Court's course of exposition of the Fourteenth Amendment.

The Court, particularly in recent years, has gone far toward bringing to realization the Holmes-Brandeis ideal of the states operating freely as social laboratories. As Mr. Justice Douglas said, in a case where a State law was sustained, "but if our recent cases mean anything, they leave debatable issues as respects business, economic and social affairs under legislative decision."⁹⁷ In sustaining another state

94. *Truax v. Corrigan*, 257 U.S. 312, 324 (1921).

95. *Lambert v. California*, 355 U.S. 225 (1957); *Moore v. Michigan*, 355 U.S. 155 (1957).

96. 104 CONG. REC. Appendix A 7787 (daily ed. Aug. 25, 1958).

97. *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952). See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (dissenting opinion of Brandeis,

law he proclaimed for the Court: "[T]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down State laws, regulatory of business and industrial conditions, because they may be unwise, imprudent, or out of harmony with a particular school of thought."⁹⁸

The same Justice, in an extra-judicial pronouncement, after referring to the cases in which the foregoing statements appear, has said:⁹⁹

"This does not mean that legislators have *carte blanche* that the States can enact any laws they choose, that there are no limites to regulation. While the Court these days does not strike down laws because it deems them unwise, improvident, or inexpedient, it stands ready to act once the outside limits have been breached. What those remedies are is impossible to define except in terms of the concrete. And the illustrations to date are rare because of the liberality of the present Court in applying the test of constitutionality to social legislation."

No other explanation than a willingness to allow a maximum of local discretion for the working out of local problems will rationalize the Court's acceptance of such patently discriminatory classifications as those involved in the cases of Michigan barmaids,¹⁰⁰ the Louisiana river pilots,¹⁰¹ and the New York truck panel advertisers.¹⁰² But when discrimination becomes blatantly preferential, the mandate of the Equal Protection Clause must be heeded.¹⁰³ In the field of freedom of expression, the Court does not question the state's right to decide that smut is not speech,¹⁰⁴ but when the state sends its book burners to touch their torches to sophisticated literature which is thought only to be too strong for juvenile digestions, the Court rules that some other cure of the problem must be sought.¹⁰⁵ Even in the field of Church-State relations, where passions run high and resentments are deep, there are signs of a disposition in the Court to leave decision in the hands of state government. After the broad dicta in *Everson v. Board of Education*,¹⁰⁶ implemented by actual decision in *McCullum v. Board*

J.). And see, ". . . [S]ocial experiments . . . in the insulated chambers afforded by the several States." *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (dissenting opinion of Holmes, J.).

98. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

99. DOUGLAS, *WE THE JUDGES* 281 (1956).

100. *Goesaert v. Cleary*, 335 U.S. 464 (1948).

101. *Kotch v. Pilot Commissioners*, 330 U.S. 552 (1947).

102. *Railway Express Agency v. New York*, 336 U.S. 106 (1949).

103. *Morey v. Doud*, 354 U.S. 457 (1957).

104. *Roth v. United States*, 354 U.S. 476 (1957).

105. *Butler v. Michigan*, 352 U.S. 380 (1957).

106. 330 U.S. 1 (1947).

of *Education*,¹⁰⁷ the Court, in *Zorach v. Clauson*,¹⁰⁸ has apparently decided at least to leave to the states a substantial area for official association with religious organizations, within which they will not be visited with the sanctions of the "an establishment of religion" clause of the Constitution. While inferences should not be drawn too freely from the Court's refusal to take a case, the record shows that on three recent occasions, the Court has declined to review state court decisions, one of which sustained, and two of which rejected, claims of violation of the "establishment" clause.¹⁰⁹

V.

CONCLUSION.

Some of the more controversial of recent decisions of the Court have happened to involve persons accused or suspected of subversive activities or leanings,¹¹⁰ and the cases in which their claims of right were sustained have occasioned severe denunciation of the Court on the charge of partiality to subversion. Most of these cases grew out of application of federal law by federal agencies. In some instances, however, cases coming from the states have also arisen out of backgrounds of charged subversion,¹¹¹ and these, too, have been added to the specifications of superficial thinkers in the bill of particulars against the Court, although such cases clearly posed legal issues entirely different from those which came up under federal law.

It would, of course, be unthinkable that the Chief Justices have become infected with the virus of such indiscriminating criticism. Yet, the Committee's Report and the Conference's Resolution show nothing which indicates that their criticism of the Court rests on a more substantial base.

The Court should never be above or beyond the reach of the voices of those who are competent to decry what it has done. But those who decry should recognize and assume the responsibility of specifying that which they censure, and should not issue condemnations in such general terms as to attack the institution as a whole.

107. 333 U.S. 203 (1948).

108. 343 U.S. 306 (1952).

109. *Gordon v. Gordon*, 332 Mass. 197, 124 N.E.2d 236, *cert. denied*, 349 U.S. 947 (1955); *Tudor v. Board*, 14 N.J. 31, 100 A.2d 857 (1953), *cert. denied*, 348 U.S. 816 (1954); *People v. Friedman*, 302 N.Y. 75, 96 N.E.2d 184 (1950), *appeal dismissed* "for want of a substantial federal question," 341 U.S. 907 (1951).

110. *Yates v. United States*, 354 U.S. 298 (1957); *Watkins v. United States*, 354 U.S. 178 (1957); *Jencks v. United States*, 353 U.S. 657 (1957).

111. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

Recent Congressional episodes illustrate the point. One reaction to express disagreement with a number of decisions of the Court was a blanket bill to curtail the Court's appellate jurisdiction.¹¹² This was reminiscent of the Reconstruction Act¹¹³ which will forever stand as an ignominious memorial of those who were intolerant of constitutionalism as defined by the traditional processes of judicial review.

Another reaction was to express a similar disagreement by a series of bills to modify specific legal rules determined by decisions of the Court.¹¹⁴

While each of the latter bills is debatable on its merits, they are all based upon the sound premise that it is possible, through constitutional means, to review even decisions of the Court which are felt to be unwise or improvident, and that it is better to deal with perceived shortcomings of the Court on a case-to-case basis than to undertake wholesale revision of the Court's function in the constitutional system.

The state chief justices have been concerned, for some years past, with a felt intrusion upon their autonomy through use of the federal writ of habeas corpus to review state court judgments in criminal cases.¹¹⁵ They would do well to concentrate all of their energies upon the pursuit of remedial legislation in this field,¹¹⁶ rather than to dissipate them in broad generalizations, difficult to substantiate, which may have no more net effect than to reduce popular respect, not only of the Supreme Court of the United States, but of the judiciary as an established institution.

112. S. 264, 85th Cong., 2d Sess. (1958). This ultimately was watered down somewhat to deprive the Court of appellate jurisdiction in specific classes of cases. The bill failed of passage.

113. 15 STAT. 44 (1868). See *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1868). Of a similar stamp were H.R. 3 and S. 337, 85th Cong., 2d Sess. (1958), which sought to limit the doctrine of preemption by establishing a legislative drafting formula. These bills failed of passage.

114. Typical was H.R. 11, 477, 85th Cong., 2d Sess. (1958), which provided for admissibility into evidence of confessions obtained between the time of arrest and the time of arraignment, thus modifying the rules laid down in *McNabb v. United States*, 318 U.S. 332 (1942) and in *Mallory v. United States*, 354 U.S. 449 (1957). This and other comparable bills failed of passage in the 85th Congress.

115. 25 STATE GOVERNMENT 249 (1952), quoted in the opinion of the Court in *Brown v. Allen*, 344 U.S. 443, 451 n. (1953), also quoted in the concurring opinion of Mr. Justice Jackson therein at 539 n. See also the report of continued interest of the Conference of the State Chief Justices in the subject, 27 STATE GOVERNMENT 209 (1954); 28 *id.* 264 (1955).

116. H.R. 8361, 85th Cong. 2d Sess. (1958), represented the perennial effort to eliminate what are widely regarded as excesses in the scope of federal habeas corpus in review of state criminal cases. This bill passed the House but was overlooked by the Senate in the confusion attendant upon final adjournment.

APPENDIX¹¹⁷

RESOLUTION ADOPTED BY THE CONFERENCE OF STATE SUPREME
COURT JUSTICES AT PASADENA, CALIFORNIA
AUGUST 23, 1958.

RESOLVED:

1. That this conference approves the Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions submitted at this meeting.

2. That in the field of Federal-State relationships the division of powers between those granted to the national government and those reserved to the state governments should be tested solely by the provisions of the Constitution of the United States and the Amendments thereto.

3. That this conference believes that our system of federalism, under which control of matters primarily of national concern is committed to our national government and control of matters primarily of local concern is reserved to the several states is sound and should be more diligently preserved.

4. That this conference, while recognizing that the application of constitutional rule to changed conditions must be sufficiently flexible as to make such rules adaptable to altered conditions, believes that a fundamental purpose of having a written constitution is to promote the certainty and stability of the provisions of law set forth in such a constitution.

5. That this conference hereby respectfully urges that the Supreme Court of the United States, in exercising the great powers confided to it for the determination of questions as to the allocation and extent of national and state powers, respectively, and as to the validity under the Federal Constitution of the exercise of powers reserved to the states, exercise one of the greatest of all judicial powers — the power of judicial self-restraint — by recognizing and giving effect to the difference between that which, on the one hand, the Constitution may prescribe or permit, and that which, on the other, a majority of the Supreme Court, as from time to time constituted, may deem desirable

117. *New York Times*, August 24, 1958, pp. 1, 42.

or undersirable, to the end that our system of federalism may continue to function with and through the preservation of local self-government.

6. That this conference firmly believes that the subject with which the Committee on Federal-State Relationships as Affected by Judicial Decisions has been concerned is one of continuing importance, and that there should be a committee appointed to deal with the subject in the ensuing year.